

01
02
03
04
05
06
07 UNITED STATES DISTRICT COURT
08 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

09 DONNA VALERIE EVANS,) CASE NO. C13-5436-RAJ-MAT
10 Plaintiff,)
11 v.) ORDER
12 CAROLYN W. COLVIN, Acting)
Commissioner of Social Security,)
13 Defendant.)
14 _____)

15 Plaintiff's appeal presents only one issue: whether the administrative law judge (ALJ)
16 erred at step three in finding that she did not meet the requirements of Listing 12.05C. This
17 listing has three requirements:

- 18 (1) Significantly subaverage general intellectual functioning with deficits in adaptive
19 functioning initially manifesting during the developmental period (before age 22);
20 (2) A valid verbal, performance, or full scale IQ of 60-70; and
21 (3) A physical or other mental impairment imposing an additional and significant
22 work-related limitation of function.

01 See 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05C.

02 The ALJ found that Plaintiff had not demonstrated the requirements of Listing 12.05C,
03 because the evidence showed that her functioning was “at a higher level”:

04 For example, the claimant shares meal preparation duties with her partner. She
05 prepares items such as tacos, chicken, and roast beef. She denied experiencing
06 any challenges with meeting personal hygiene needs. She needs no reminders
07 to complete these activities. She is responsible for cleaning her residence. She
08 indicated she does clean her home. She occasionally watches movies at a
09 cinema. She shops independently, utilizes public transportation, and manages
10 her own finances. ([AR 571.]) Further, the claimant has engaged in
substantial gainful activity in the past, and according to her testimony, the jobs
she had performed in the past would not be considered sheltered work. This
ability to engage in jobs, including one where she did some supervising,
supports the conclusion that the claimant’s adaptive functioning is at a higher
level and thus, 12.05C is not met.

11 (AR 23.)

12 Plaintiff argues that the ALJ erred in focusing on her adaptive functioning, which is
13 not one of the Listing 12.05C criteria. Dkt. 21 at 6-7. The Commissioner argues that because
14 “adaptive functioning” is mentioned in the first 12.05C criterion, the ALJ did not err in
15 considering it at step three and did not err in finding that Plaintiff had not demonstrated
16 deficits therein and thus did not meet Listing 12.05C. Dkt. 22 at 5-6.

17 Although the depth of Plaintiff’s argument is lacking, the Commissioner’s briefing
18 also overlooks most of the considerable body of case law analyzing the requirements of
19 Listing 12.05C. The parties have not provided sufficient analysis of the scope of the first
20 requirement of Listing 12.05C, specifically whether it is intended to look beyond a
21 temporal/onset requirement to more recent functioning levels, or whether “deficits in adaptive
22 functioning” refers to deficits that occurred during the development period only, *i.e.*,

01 “attendance in special education classes, dropping out of high school prior to graduation,
02 difficulties in reading, writing or math, and low skilled work history.” *Campbell v. Astrue*,
03 Case No. 09-cv-465GSA, 2011 WL 444783, at *17 (E.D. Cal. Feb. 8, 2011). *See also Gomez*
04 *v. Astrue*, 695 F.Supp.2d 1049, 1060-61 (C.D. Cal. 2010) (discussing Listing 12.05C’s first
05 requirement as intended to limit coverage to an impairment that is “not of recent origin due to
06 a traumatic event or some other changed circumstance”). According to Plaintiff, the ALJ’s
07 focus on her more recent adaptive functioning is misguided, due to the unique structure of
08 Listing 12.05C, because a claimant can meet Listing 12.05C without “having to demonstrate a
09 disabling, or even severe, level of mental functioning impairment.” *Gomez*, 695 F.Supp.2d at
10 1057.

11 Many courts in the Ninth Circuit have agreed with Plaintiff’s position that the first
12 prong of Listing 12.05C focuses entirely on the time the impairment *initially* manifested and
13 does not take into account *current* adaptive functioning deficits. *See, e.g., Thresher v. Astrue*,
14 283 Fed. Appx. 473, 475 (9th Cir. Jun. 19, 2008); *Pedro v. Astrue*, 849 F.Supp.2d 1006 (D.
15 Or. 2011); *Knarr v. Astrue*, Case No. 11-cv-41-BR, 2012 WL 1194319 (D. Or. Apr. 9, 2012);
16 *Forsythe v. Astrue*, Case No. 12-cv-1515-AWI-GSA, 2012 WL 217751 (E.D. Cal. Jan. 24,
17 2012); *Frazier v. Astrue*, Case No. 09-3063, 2010 WL 3910331 (E.D. Wash. Oct. 4, 2010);
18 *Lewis v. Astrue*, Case No. 06-6608-SI, 2008 WL 191415 (N.D. Cal. Jan. 22, 2008).

19 Some courts in other circuits have taken a different approach, concluding that an ALJ
20 may also consider whether the claimant’s adaptive functioning deficits have continued beyond
21 the developmental period. *See, e.g., Talavera v. Astrue*, 697 F.3d 145, 153 (2d Cir. 2012)
22 (interpreting the regulations to recognize that because a low IQ score does not necessarily

01 suggest that a claimant cannot work, the claimant is not disabled if his or her “adaptive
02 functioning is sufficiently intact”); *Novy v. Astrue*, 497 F.3d 708, 709 (7th Cir. 2007) (holding
03 that a claimant did not meet Listing 12.05C because the evidence showed she could “cope
04 with the challenges of ordinary everyday life” despite her intellectual limitations); *Randall v.*
05 *Astrue*, 570 F.3d 651, 660-61 (5th Cir. 2009); *West v. Comm’r of Social Sec. Admin.*, 240 Fed.
06 Appx. 692 (6th Cir. 2007); *Garrett v. Astrue*, 244 Fed. Appx. 937, 938 (11th Cir. 2007). The
07 court is aware of only one Ninth Circuit case that seems to consider a claimant’s current
08 adaptive functioning when assessing whether she met Listing 12.05C. *See Brooks v.*
09 *Barnhart*, 167 Fed. Appx. 598 (9th Cir. 2006). The parties’ briefing does not fully analyze
10 the relevant case law that should guide the court’s interpretation of the first prong of Listing
11 12.05C, and thus additional briefing is necessary.

12 The interpretation of the first prong of Listing 12.05C is particularly crucial to the
13 outcome of this case because the ALJ’s decision indicates that the second and third criteria of
14 Listing 12.05C are met. (AR 21, 23 (finding that Plaintiff has a severe physical impairment
15 and that her full-scale IQ score of 66 is “in the 12.05C range”).) *See also Pedro*, 849
16 F.Supp.2d at 1015-16 (holding that a step-two finding that a claimant has a severe impairment
17 *per se* satisfies the third prong of Listing 12.05C). Although the Commissioner devotes most
18 of the argument portion of her Response Brief to arguing that the ALJ was entitled to discredit
19 Plaintiff’s IQ score (Dkt. 22 at 7-10), the ALJ did not, in fact, discredit Plaintiff’s IQ score.
20 Instead, the ALJ credited Plaintiff’s IQ score and explicitly noted that it was within the
21 12.05C range. (AR 23.)

22 Thus, the Court directs the parties to submit supplemental briefing addressing the first

01 prong of Listing 12.05C, specifically the proper scope of the ALJ's review of evidence of a
02 claimant's adaptive functioning before or after age 22. The parties are directed to submit
03 supplemental briefs of no longer than twelve pages, no later than January 24, 2014.

04 DATED this 7th day of January, 2014.

05
06 

07 Mary Alice Theiler
08 Chief United States Magistrate Judge
09
10
11
12
13
14
15
16
17
18
19
20
21
22